Supreme Court, U.S.
FILED
JUN 6 1991
OFFICE OF THE CLERK

No. 90-1486

IN THE
Supreme Court of the United States

October Term, 1990

TODD EDWARD LONG, PHYLLIS ANN MAXWELL, CATHY IRENE ARMSTRONG, EDWARD DEE ARMSTRONG, JOHN E. SHEA, AND CMH ENTERPRISES, INC.

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH
Attorney General

PEGGY A. QUINCE
Assistant Attorney General
Counsel of Record

DEPARTMENT OF LEGAL AFFAIRS
2002 North Lois Avenue
Westwood Center, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does the application of the Florida Racketeering Influence and Corrupt Organization (RICO) Act to obscenity prosecutions create a chilling effect on the exercise of first amendment rights?

2. Is the Florida obscenity statute, Section 847.011, Florida Statutes, drafted in conformity with this Court's pronouncement in *Miller v. California,* 413 U.S. 15 (1973), unconstitutionally vague?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE WRIT 6

The Florida Supreme Court did not address any question of federal constitutional law 6

The opinion from the Florida Supreme Court on the application of the RICO statutes to obscenity prosecutions does not conflict with any decision from another state court of last resort or any United States court of appeals and is in conformity with the decisions from this Court on the same issue 6

The decision of the Florida Supreme Court does not decide any important federal question which this Court has not settled and the Miller standard has been reaffirmed by this Court in *Pope v. Illinois,* 481 U.S. 497 (1987) 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 7, 8, 9, 10

Hamling v. United States, 18 U.S. 87 (1974) 10

Herb v. Pitcairn, 324 U.S. 117 (1945) 6

J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1983), *revd sub nom., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) 8

Michigan v. Long, 463 U.S. 1032 (1983) 6

Miller v. California, 413 U.S. 15 (1973) . . . . . *passim*

Osborne v. Ohio, 495 U.S. _____, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) 10

Polykoff v. Collins, 816 F.2d 1326 (9th Cir. 1987) 8

Pope v. Illinois, 481 U.S. 497 (1987) . . . . . *passim*

Smith v. California, 361 U.S. 147 (1959) 7

Stall v. State, 570 So.2d 257 (Fla. 1990) 1, 5, 6

State v. Long, 544 So.2d 219 (Fla. 2d DCA 1989) . . . 1, 5

OTHER AUTHORITIES:

United States Constitution
Amendment 1 2
Amendment 14 2

Florida Constitution
Article I, Section 23 . . . . . 2, 6

Page

Florida Statutes
§ 847.011 . . . . . *passim*
§ 847.011(1)(a) 2
§ 895.02 3
§ 895.03 4
§ 895.04 4

Rule 3.701, Fla.R.Crim.P. 7

OPINIONS BELOW

The opinion of the Florida Supreme Court in this cause is reported as *Stall v. State,* 570 So.2d 257 (Fla. 1990), and the opinion of the Second District Court of Appeal reversing the ruling of the trial court is cited as *State v. Long,* 544 So.2d 219 (Fla. 2d DCA 1989). Both opinions have been reproduced in their entirety as Appendix A and B, respectively, in the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 14. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Constitution

Article I, Section 23. Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Florida Statutes

Section 847.011(1)(a). Any person who knowingingly sells, lends, gives away, distributes, transmits, shows, or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show transmute, or advertise in any manner, any obscene book, magazine, periodical, pamphlet, newspaper,

comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person knowingly to do or assist in doing any act or thing mentioned above, is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, or s. 775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 895.02. (1) Racketeering activity means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

(a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes:

28. Section 847.011, s. 847.012, s. 847.013, s. 847.06, or s. 847.07, relating to obscene literature and profanity.

STATEMENT OF THE CASE

The Petitioners, and Tommie Stall, were charged in a forty-seven (47) count information in the Circuit Court for the Tenth Judicial Circuit in and for Polk County, Florida, with a number of offenses involving the hiring of persons to distribute obscene materials, distribution of an obscene movie, RICO, distribution of an obscene magazine, distribution of an obscene article or instrument, possession of obscene movies with intent to sell or distribute, possession of obscene instrument with intent to sell or distribute and possession of obscene magazine with intent to sell or distribute, in violation of Section 847.011, Florida Statutes, and Sections 895.03 and 895.04, Florida Statutes. A number of pretrial motions were filed including a motion to determine the reasonable man standard, a motion to dismiss alleging Section 847.011 violates Florida's right to privacy, a motion to dismiss alleging the statute does not conform to the requirements of *Miller v. California,* 413 U.S. 15 (1973) and *Pope v. Illinois,* 481 U.S. 497 (1987), a motion to dismiss for vagueness, a motion to dismiss alleging the obscenity statute provided for excessive punishment, insufficient scienter and had a chilling effect on first amendment rights.

Memoranda in opposition to these motions were filed by the State. A hearing was held before the Honorable E. Randolph Bentley was held on December 1-2, 1987. On January 8, 1988, Judge Bentley entered an order denying the motion to strike the jury list, denied the motion to dismiss for inability to seat a fair jury, modified the definition of a reasonable man, granted the motion to dismiss finding a right to privacy is violated when applied to material offered for sale or rent and intended for home use, denied the motion to dismiss for excessive punishment and insufficient scienter and granted the motion as having a chilling effect on first amendment rights. He also held the RICO statute as applied to obscenity to be violative of the

U.S. Constitution, declared the obscenity statute to be violative of due process because of vagueness, and found the obscenity statute did not conform to the requirements of *Miller* and *Pope*.

The State of Florida timely filed a notice of appeal, and briefed all of the points the trial judge had decided adversely to the State. The Second District Court of Appeal on March 31, 1989 filed an opinion, cited as *State v. Long*, 544 So.2d 219 (Fla. 2d DCA 1989), reversing the trial court and indicating the obscenity statute met constitutional muster. The district court specifically held that the statute did not violate the right to privacy under the Florida Constitution.

Further review was sought and had in the Florida Supreme Court. And that court found the Florida obscenity statute constitutional as it did not violate the Florida right to privacy. *Stall v. State*, 570 So.2d 257 (Fla. 1990). A Petition for Writ of Certiorari to this Court followed.

REASONS FOR DENYING THE WRIT

The Florida Supreme Court did not address any question of federal constitutional law.

Certiorari review should be denied in this case since the Florida Supreme Court, the state court of last resort, did not address any federal constitutional issue. After citing to this Court's opinions which held that obscenity was not entitled to the full protection of the First Amendment, the Florida Supreme Court actually addressed and decided only the issue of whether or not the Florida Right to Privacy Amendment, Art. I, § 23, Fla. Const., protects the sellers and distributors of obscene material.

In holding that there is no right to publicly sell obscene materials, the court relied on its interpretation of a state constitutional provision. Thus it is clear that *Stall v. State, supra,* was decided on an independent and adequate state ground, and it is, therefore, not reviewable by this Court. *See, Herb v. Pitcairn,* 324 U.S. 117 (1945) and *Michigan v. Long,* 463 U.S. 1032 (1983).

The opinion from the Florida Supreme Court on the application of the RICO statutes to obscenity prosecutions does not conflict with any decision from another state court of last resort or any United States court of appeals and is in conformity with the decisions from this Court on the same issue

Both the Florida Supreme Court and Second District Court of Appeal, in addressing the petitioners' claim that the use of the Florida Racketeering Influence and Corrupt Organization (RICO) Act on obscenity prosecutions had a chilling effect on the exercise of First Amendment rights, looked to the decisional law from this Court in finding that the

application of this statute was constitutionally permitted. No other pronouncement beyond acknowledgment of this Court's cases was made by the Florida Supreme Court. Both courts cited to this Court's opinion of *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46 (1989), as authority that obscenity offenses may be used as predicate acts under RICO prosecutions. In *Fort Wayne Books* the defendants argued, as do the petitioners *sub judice,* that the harsher penalties under RICO placed an unconstitutional chilling effect on the exercise of First Amendment rights. However, this Court held that neither the possibility of harsher penalties nor the possibility of self-censorship results in a violation of the First Amendment. *See also, Smith v. California,* 361 U.S. 147 (1959).

There is no dispute that under Florida Law penalties for violating the RICO statute are more severe than the penalties outlined in the obscenity statute. But, petitioners' argument that the potential 30 year sentence under RICO is imposed for as few as two obscenity violations overlooks other important aspects of the RICO statute. That statute is a tool used to convict and punish those persons who have demonstrated a continuing course of criminal conduct, *i.e.,* an enterprise. It is not enough under a RICO prosecution that one engage in any of the predicate offenses, including obscenity violations only once. The State, via the State Attorney, must not only prove the defendant engaged in the prohibited activities at least twice, the State must also plead and prove "a pattern of racketeering activity" and "an enterprise."

Once the State Attorney has proven all of the elements of a RICO violation, pattern of racketeering, enterprise, and at least two predicate offenses, the Florida Sentencing Guidelines would then come into play. Rule 3.701, Florida Rules of Criminal Procedure, by its own terms, is applicable to a RICO conviction since the guidelines are to be used in

all noncapital cases, and a prosecution under RICO is noncapital. In this case, the guidelines would result in sentences much less severe, including any nonstate prison sanction, than the "draconian" sanctions these petitioners argue.

The petitioners' extra-record reference to a newspaper article concerning the number of x-rated videos available on the market, if true, demonstrates in part the error of their chilling effect argument. It would appear from such statistics that many are not deterred despite the possibility of severe punishments.

Petitioners attempt to argue conflict pursuant to Supreme Court Rule 10.1(b) with a decision from a United States court of appeals is not persuasive. Rather than supporting conflict, the ninth circuit's opinion of *Polykoff v. Collins,* 816 F.2d 1326 (9th Cir. 1987), while decided prior to *Fort Wayne Books,* is in conformity with that case. The ninth circuit in *Polykoff* actually held that the huge potential felony fines of $150,000.00 and $1,000,000.00 did not have an unconstitutional chilling effect on free speech. That court went on to say that any chilling effect was attributable to the state's legitimate deterrent goals.

Likewise, *J-R Distributors, Inc. v. Eikenberry,* 725 F.2d 482 (9th Cir. 1983), *revd sub nom., Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491 (1985), does not aid petitioners' conflict argument. First, the case did not involve an interpretation of a RICO statute as applied to obscenity. Secondly, the state statute involved concerned fines which were based in part on constitutionally protected activity.

Neither of the cases relied on by the petitioners can be used to demonstrate conflict among the courts. Neither *J-R Distributors, Inc.* nor *Polykoff* involved a RICO prosecution. And even if it could be argued that the same principles are applicable because the court discussed the chilling effect of penalties on the exercise of First Amendment rights, both of

the cases were decided before this Court rendered its opinion in the *Fort Wayne Books* case.

The argument that this Court should look at this case and re-examine *Miller v. California,* 413 U.S. 15 (1973), because of the changing moral or social climate, has been repeatedly argued and rejected and should be rejected in this case. This Court has recognized by the very standards outlined in *Miller* that what appeals to the "prurient interest" or is "patently offensive" cannot be precisely defined for all states and/or communities. Thus, the first prong of the *Miller* standard is "whether the average person, applying *contemporary community standards* would find that the work taken as a whole, appeals to the prurient interest." Such a standard takes into consideration the "social changes" argument.

Respondent cannot agree that obscene videos have become a staple of the American home video marketplace. References to magazine and journal articles do not constitute proof of the matters contained therein. Contrary to the assertions being made by petitioners, the evidence suggests that obscenity is not being embraced by society. The strengthening of obscenity statutes and their vigorous enforcement points up the fact that society is concerned about the continued distribution of obscene materials in their communities.

Petitioners have failed to properly invoke this Court's jurisdiction by presenting an issue worthy of certiorari review.

The decision of the Florida Supreme Court does not decide any important federal question which this Court has not settled and the Miller standard has been reaffirmed by this Court in *Pope v. Illinois*, 481 U.S. 497 (1987)

Despite petitioners' grudging acknowledgment, *Miller v. California,* 413 U.S. 15 (1973), continues to be the standard as articulated by this Court for prosecution of obscenity cases. All of the recent cases from this Court have upheld the states' right to prosecute obscenity law violations and in each instance have reaffirmed *Miller. See, e.g., Hamling v. United States,* 418 U.S. 87 (1974); *Pope v. Illinois,* 481 U.S. 497 (1987); *Fort Wayne Books, Inc. v. Indiana, supra,* and *Osborne v. Ohio,* 495 U.S. _____, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990).

These petitioners have not presented any legitimate bases for a re-examination of the *Miller* standard. The mere fact that some state courts have found independent state ground reasons for invalidating their obscenity laws does not support a claim that *Miller* has fallen into disrepute. The decisions by the Hawaii court and the Oregon court were not grounded on the opinions from this Court. Rather, those courts chose to interpret their own constitutions in a manner which would allow for invalidating the statutes.

These petitioners also argue the *Miller* standard does not require meaningful scienter. While they concede there is a requirement of knowledge of the contents, character and nature of the materials, they want more without any cause for complaint. The more knowlege desired by the petitioners is that the state prove knowledge of the material's status as obscenity. But isn't the material's status a question to be decided by the jury? If the State could automatically make that decision instead of the jury, petitioners would be before this Court with a different set of arguments.

The argument that jurists differ on the meaning of obscenity has been espoused by various parties since *Miller*. And this Court in *Miller* said:

> The mere fact juries may reach different conclusions as to the same material, does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States,* 354 US, at 492 n 30, 1 L Ed 2d 1498 "it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system".

37 L.Ed.2d at 432.

The opinions expressed in dissents are just that, differences of opinion. These differences of opinions appear with frequency in our system of laws. However, to elevate them to the status of being the law defeats the whole purpose of our system. The majorities in *Miller* and *Pope* recognize the problems inherent in defining obscenity; the difficulty of the task does not negate the effectiveness of the standard which has proven workable. Both Congress and the Florida legislature have addressed an ill which cuts to the fabric of our society. These laws have been drawn with enough flexibility to protect individual rights while also protecting the society as a whole.

The fact that petitioners do not agree with *Miller* and its progeny is not a basis for certiorari review.

CONCLUSION

For the foregoing reasons, Respondent submits the Petition for Writ of Certiorari to the Florida Supreme Court should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

PEGGY A. QUINCE
Assistant Attorney General
Counsel of Record

DEPARTMENT OF LEGAL AFFAIRS
2002 North Lois Avenue
Westwood Center, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT